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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1357

COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

WILLIAM C. CULPEPPER,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO, prays a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order and memorandum of the Court of Appeals (App. A, *infra*, pps. 1a-5a) is not yet reported.[1] That opinion affirmed the following: an NLRB Order Denying [petitioner's] Motion For Reconsideration and Stay of the Board's order dated July 28, 1975 (App. B, *infra*, pps. 6a-7a), apparently not reported; NLRB Supplemental Decision and Order dated July 11, 1975 reported at 219 NLRB No. 18 (App. C, *infra*, pps. 8a-10a), wherein the NLRB affirmed and adopted the Administrative Law Judge Decision and Order dated November 21, 1972 (App. F, *infra*, pps. 22a-38a); an NLRB Order Denying [intervenor's] Motion For Reconsideration dated October 15, 1974 reported at 214 NLRB No. 13 (App. D, *infra*, pps. 11a-15a); and NLRB Decision and Order dated December 12, 1973 reported at 207 NLRB No. 125 (App. E, *infra*, pps. 16a-21a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1977.[2] Orders denying petitioner's request for rehearing or for rehearing *en banc* were entered on February 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Did the NLRB's deferral to the parties' contractual grievance-arbitration machinery, and then its subsequent decision to decide the case even though the arbitration hearing had been held, conflict with the national policy

[1] The order noted that, pursuant to local rule 8(f), it was not to be published. A motion by respondent NLRB to reissue the order and memorandum as a *per curiam* decision was granted.

[2] Respondent NLRB was granted leave to file a proposed judgment after the time to submit the decree had passed.

—as stated by Congress and construed by this Court and other courts—favoring arbitration as a method of final settlement in labor disputes?

2. Did the NLRB's decision to usurp the arbitrator's authority so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

STATUTE INVOLVED

Section 10(a), 29 U.S.C. 160 of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) (herein Act) provides in relevant part:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . .
>
> * * * *

Section 203(d), 29 U.S.C. 173(d) of the Act provides in relevant part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.
>
> * * * *

Section 185(a), 29 U.S.C. 185(a) of the Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the par-

ties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Background.

Petitioner Columbia Typographical Union No. 101 (Union) and Byron S. Adams Printing, Inc. (Adams) are parties to a collective bargaining agreement. The contract contains a grievance procedure if there are any "differences of opinion as to interpretation or enforcement of this Agreement" (A. 101).[3] If a settlement cannot be reached, the matter in dispute would be referred to a "final and binding" arbitration decision (A. 102).

It was also agreed that the "Chapel Chairman is the Union's representative of the employees" and would "represent the Union in all disagreements arising under this Agreement" (A. 103). There was also an understanding that (A. 103):

> The foreman shall be a member of the Union in good standing. The foreman is management's representative, and he shall not be subject to fine, discipline or expulsion by the Union for any act in the performance of his duties as foreman, when such action is authorized by this Agreement. . . .

Intervenor William Culpepper is the general foreman of the composing room at Adams and Jessie Manbeck is the Union's vice-president and chapel chairman (A. 15, 19, 96). One day, Culpepper invited Manbeck to a meeting to discuss various grievances; as the conversation ended Manbeck suddenly realized that Culpepper had secretly tape recorded the whole conversation (A. 22-27).

On January 7, 1972, Adams unilaterally placed a time limitation on how much time Manbeck could spend in

[3] References designated "A" are to the Appendix submitted to the Court of Appeals.

the composing room discussing employee complaints or grievances (A. 89). A few days later, Manbeck was on his way out of the Adams composing room when Culpepper dared him to remain on the premises and, not surprisingly, Manbeck accepted the challenge. The police were then called to remove the "trespasser" and Manbeck was arrested, handcuffed and taken away (A. 59, 66-67, 78).

The Union, believing that Manbeck's rights both under law, the contract, and the Union's Constitution had been violated, fined and expelled Culpepper. The chapel chairman then ruled that the Union employees at Adams could not take orders from Culpepper because Culpepper had been expelled and the collective bargaining agreement required the foreman to be a member of the Union (A. 94-97, 108).

At the hearing, the Administrative Law Judge (ALJ) refused to allow testimony proffered by the Union relating to its defense that the contract specifically allowed the Union to fine or expel a foreman if, as provided in section 35 of the agreement, he is in "willful or persistent violation of this agreement" (A. 46-52). The basis of this exclusionary ruling was that the only thing relevant—despite clear NLRB law that statutory rights may be modified by contract—is "the Taft-Hartley Act" (A. 48).

B. The Decisions.

The ALJ, rejecting a motion by the Union that the case raised issues of contract interpretation that should be resolved by an arbitrator, ruled on November 21, 1972 that the Union had violated the Act. (App. F, *infra*, pps. 22a-38a). More than a year later, on December 12, 1973, the Board reversed and deferred the case to the parties' grievance and arbitration procedure (App. E, *infra*, pps. 16a-21a).

On January 11, 1974, Culpepper moved the Board to vacate its Decision because the Union had not invoked the grievance procedure. The Board ruled on October 15, 1974 that the motion was without merit because it was the obligation of either Culpepper or Adams to file the grievance (App. D, *infra*, pps. 11a-14a). The Board also stated (*Id.*, at p. 13a):

> [J]urisdiction of this proceeding is hereby retained for the limited purpose of entertaining appropriate and timely motions for further consideration upon a proper showing . . . that the dispute has had, with reasonable promptness after the issuance of this Decision and Order, been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration. . . .

Thereafter, on October 18, 1974, Culpepper and Adams filed a grievance (A. 150-151). Culpepper made a motion to the Board dated January 16, 1975 requesting an affirmance of the ALJ's Decision and Order because the Union had not yet agreed to submit the matter to arbitration (A. 145-154). By January 30, 1975, however, the parties had agreed on the issues to be litigated in arbitration and had selected an arbitrator (A. 155-156).

Thereafter, despite the opposition of Culpepper and Adams, the union twice sought and obtained permission from the arbitrator to postpone the hearing (A. 158, 160, 162-163). The arbitration proceeding was then held and completed on June 24 and 25, 1975 and it was agreed that briefs would be filed with the arbitrator by July 15, 1975 (A. 163, 165, 172).

However, on July 11, 1975, the Board granted Culpepper's January 16, 1975 motion, reasserted jurisdiction and adopted the ALJ's Decision and Order (App. C, *infra*, pps. 8a-11a). The Board stated (*Id.*, at p. 9a):

> [T]he dispute has yet to reach the arbitral forum because of Respondent's [Union] repeated cancellations of agreed-to, and scheduled times for arbitration. These numerous postponements are not commensurate with Respondent's obligation to arbitrate the dispute with reasonable promptness.

The Union moved for reconsideration, pointing out that the arbitration had taken place but the motion was denied (App. B, *infra*, pps. 6a-7a). A petition for review filed by the Union, pursuant to section 10(e), 29 U.S.C. 160(e) of the Act, was denied by the Court of Appeals for the District of Columbia Circuit (App. A, *infra*, pps. 1a-5a).

REASONS FOR GRANTING THE WRIT

1. Federal labor policy favors arbitration as a mechanism of settlement of disputes because "arbitration is the substitute for industrial strife." *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). As this Court said in *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960):

> Section 203(d) of the . . . [Act] states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

This statement was an obvious extension of the principle established in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), that section 301 gave federal courts authority to enforce a promise to arbitrate disputes under a collective bargaining agreement. Thereafter, this Court held in *Smith* v. *Evening News Association*, 371 U.S. 195 (1962), and then in *Carey* v. *Westinghouse Electric*

Corp., 375 U.S. 261 (1964), that a promise to arbitrate would be enforced even though the NLRB would also have jurisdiction over the dispute. See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368, 381 (1974); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

In furtherance of the policy fostering arbitration, "This Court has established a strong presumption favoring arbitrability." *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionary Workers Union*, —— U.S. ——, ——, 94 LRRM 2753, 2757 (March 7, 1977). See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co., supra*, 363 U.S. at 582-583; *United Steelworkers of America* v. *American Mfg. Co., supra*, 363 U.S. at 567-568.

To also ensure that arbitration "is given full play", this Court stated in *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960):

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be underminded if courts had the final say on the merits of the awards.

And in this connection, this Court made clear in *John Wiley & Sons, Inc.* v. *Livingston, supra*, 376 U.S. at 557:

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

This decision created "a categoric rule of law that questions of procedural compliance are to be preserved for

the arbitrator" *United Steelworkers of America* v. *McGraw-Edison Power Systems Division*, 79 LRRM 2214 (D.N.D. Ala., 1971) (apparently not reported). Thus, the arbitrator has the responsibility of deciding both "intrinsic" and "extrinsic" procedural matters. *Int'l. Union of Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 490 (1972).

The NLRB has expressed its deference to the arbitral process. This agency declared in *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955) that arbitration awards will be respected if the unfair labor practices issued have been resolved in that proceeding and "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." Then in *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board established an absention policy where it would not exercise jurisdiction when conduct was arguably an unfair labor practice and a contract violation if the parties had a grievance-arbitration provision in their agreement and the respondent would agree to have the issue resolved by that procedure.

The *Collyer* holding was cited with approval by this Court in *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville and Vicinity*, 417 U.S. 12, 18 (1974), where it was said:

> The Board's practice and policy of declining to exercise its concurrent jurisdiction over arguably unfair labor practices which also violate provisions of collective-bargaining agreements for voluntary adjustment of disputes, highlights the congressional purpose that § 301 suits in state and federal courts should be the primary means for 'promoting collective bargaining that [ends] with agreements not to strike.' *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 453 (1957). The assurance of swift and

> effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no-strike clauses.

The Board's abstention policy is thus clearly in recognition of "the statutory policy favoring the fullest use of collective bargaining and the arbitral process." *Collyer*, *supra*, 192 NLRB at 841. But this accommodation by the NLRB to the national policy favoring arbitration is meaningless unless the Board also accepts and adopts—which the agency did by implication in *Collyer*—the relevant principles of law established under section 301. Indeed, the Board recognized the law established under section 301 when in *Ray Robinson Chevrolet*, 228 NLRB No. 103 (sl. op., p. 3 and n. 3) (March 1977) it deferred though there was an issue as to arbitrability, citing in support *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, *supra*, 363 U.S. at 582-583. As the Board further recognized in *Electronic Reproductions Service Corp.*, 213 NLRB 758, 763, 764 (1974):

> The prohibitions in our Act of 'unfair labor practices', rather than being designed to eliminate, insofar as possible, certain specific evils, are instead designed only as an integral part of a comprehensive regulatory scheme designed to promote industrial peace and to eliminate the obstacles to the free flow of commerce which Congress concluded had resulted from industrial strife.

To put it another way, when the Board defers to an arbitrator, it is relinquishing its power to decide when a continuance should be granted. As was noted in *Sinclair Refining Co.* v. *NLRB*, 306 F.2d 569, 576 (C.A. 5, 1962), "What the Supreme Court says of the relative incapacity of Judge applies with equal force to those comprising the National Labor Relations Board." Since the NLRB acts in a public capacity to give effect to the declared public policy contained in the Act, *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 362 (1940); and

since extremely limited review of arbitrator decisions—both on substantive and procedural issues—is one of the underpinnings to the development of arbitration as the preferred method of settlement; therefore, the Board's deferral means it has embraced, but imperfectly applied, the principle that the arbitrator is the decision maker.

In short, though the Board abstained, it was quick to substitute its judgment for that of an experienced arbitrator. True, the Board abstained voluntarily, but "We do not suggest that the Board can announce a policy regarding deference to arbitration and then blithely ignore it, thereby leading astray litigants who depended upon it." *NLRB* v. *Horn & Hardart Co.*, 439 F.2d 674, 679 (C.A. 2, 1971). The union, submits then, that the Board acted unreasonably when it failed to give hospitable acceptance to the arbitrator's decision to grant the continuances; after all, "the Board has established criteria to guide its decision and to this extent self-imposed restraints limit its discretion." *Hawaiian Hauling Service, Ltd.* v. *NLRB*, 545 F.2d 674, 676 (C.A. 9, 1976).

Other courts have also cautioned the Board. In *Raytheon* v. *NLRB*, 326 F.2d 471, 473 (C.A. 1, 1974), the court said:

> In view of the importance the Supreme Court lays upon the value of arbitration proceedings in effectuating the national labor policy we have strong doubts whether the Board should have rejected the arbitrator's finding. . . .

In *Associated Press* v. *NLRB*, 492 F.2d 662, 667 (C.A. D.C., 1974), the court said the Board should not "give *de novo* consideration to the issue which the arbitrator might resolve." See also *NLRB* v. *Auburn Rubber Corp.*, 384 F.2d 1 (C.A. 10, 1967); *NLRB* v. *Hershey Chocolate Corp.*, 297 F.2d 286, 293-294 (C.A. 3, 1961). Therefore, this decision is repugnant to the purposes and policies of the Act and should be struck down as a viola-

tion of the statutory scheme. Additionally, such a ruling would make it clear to both the Board and the courts that there are not to be any encroachments on the carefully constructed principle that arbitration is the preferred method of settlement.

We also believe this decision conflicts with other Board and court rulings that have acknowledged the appropriateness of an accommodation between the statutory unfair labor practice procedure and the expressed purposes and policies in that same statute favoring settlement through the arbitration process. Thus, it was stated in *Local Union 715, IBEW* v. *NLRB*, 494 F.2d 1136, 1138 (C.A.D.C., 1974), in the context of an employer's refusal to comply with an arbitration award, that "If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process, including the enforcement of arbitral awards." The union fails to understand how deferral is not appropriate in the instant case when it proceeded to arbitration and deferral is appropriate in *Local Union 715, supra*, even though the litigant has refused to comply with an arbitration award.

Other cases deferring to arbitration prove that an inconsistent approach was taken in the case at bar. In *Medical Manors*, 199 NLRB 840, 841 (1972), the Board deferred though it admitted the respondent "may have engaged in unwarranted foot-dragging in complying with the contractual grievance-arbitration procedures" and that in one instance the union was forced to go to a state court to obtain an order compelling respondent to proceed to arbitration.[4] In *Packerland Packing Co.*, 216 NLRB No. 128 (1975), the Board deferred though the employer had delayed or refused to comply with two prior arbitration awards. In two cases involving *Columbia Typographical Union No. 101 (The Washington Post*

[4] The difference between this case and *Medical Manors* is made even more evident when it is noted that the company never did go to arbitration. *Medical Manors*, 206 NLRB No. 124 (1973).

Co.), 220 NLRB No. 144, 220 NLRB No. 166 (1975), arbitration was ordered even though the employer waited 10 months after the deferral decision before filing the grievances.

In *Todd Shipyards Corp.*, 203 NLRB 114 (1973), the Board deferred even though the underlying issue was the employer's efforts to stifle the grievance-arbitration procedure. In *Tyee Construction Co.*, 202 NLRB 307 (1973), one reason the Board deferred is "that the relationship between the parties has been harmonious and productive for several years" and there is nothing in the record in the case at bar to suggest that that is not the situation here. In *Great Coastal Express, Inc.*, 196 NLRB 871 (1972), the company refused for several months to discuss the grievance that produced the unfair labor practice charge and there had been a previous dispute involving the same issue that was the subject matter of the grievance. In *Port Drum Co.*, 170 NLRB 590 (1968), the Board deferred to arbitration even though the very reason the unfair labor practice complaint issued was because the union had refused to take the grievance to arbitration. And finally, in *Dubo Mfg. Corp.*, 142 NLRB 431, 432 (1963), the Board deferred even though the respondent had yet to comply with a district court order requiring the respondent to arbitrate grievances. We fail to understand how deferral could be permitted in these cases and not here. We also fail to understand why the circuit court ignored its own ruling that a Board decision may be reversed when the agency does not explain inconsistent decisions. *Herbert Harvey, Inc.* v. *NLRB*, 424 F.2d 770, 780-783 (C.A.D.C., 1969). See also *NLRB* v. *General Stencils, Inc.*, 438 F.2d 894, 901-905 (C.A. 2, 1971); *Great Lakes Screw Corp.* v. *NLRB*, 409 F.2d 375, 379-382 (C.A. 7, 1969).[5]

[5] We are aware that the Board has now modified the position stated in *Collyer* and would not defer if this case was now before

2. Petitioner also submits that the NLRB departed from the accepted and usual course of judicial proceedings and that this Court should not allow such conduct by an agency of the federal government.

The Board properly failed to instruct the Union how to proceed. The NLRB ordered that the matter was to be "submitted promptly to arbitration." However, "the word 'promptly' is indefinite in meaning, and may mean different lengths of time under different circumstances." *Combustion Engineering Co., Inc.*, 20 LA 416, 419 (1953). Certainly, by arbitration standards these days, the Union was able to complete the arbitration "promptly." Thus:

> Most of us, arbitrators and advocates alike, would undoubtedly agree that delay is the most pressing problem in the arbitration field today. It is not uncommon for parties to have to wait six months or longer for a hearing date and another six months or longer for a decision. In some situations, the grievances that are being decided today are three or four years old or even older.[6]

Under the National Railway Adjustment Board System, awards were "rendered two or three years—or even longer—after the events giving rise to the grievance." Hoellering, *Expedited Arbitration of Labor Grievances—II*, N.Y.L.J. (August 4, 1975). Some grievances went 10 years before adjusted. *Walker* v. *Southern Ry. Co.*, 385 U.S. 197, 198 (1966). Almost 20 years ago—and things have certainly gotten worse since—one study showed that 37 percent of grievances took more than

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the Board. *General American Transportation Corp.*, 228 NLRB No. 102 (March 16, 1977). A reading of the decision, however, indicates no retroactive effect. Moreover, other three-person panels of the NLRB might well produce a contrary result.

[6] Killingsworth, *Twenty-Five Years of Labor Arbitration—And The Future* (p. 11, 24), 25th Annual Meeting National Academy of Arbitrators (BNA, 1972).

six months to be resolved and 13 percent more than a year. Ross, *The Well-Aged Arbitration Case*, 11 Ind. & Lab. Rel. Rev., 262, 263 (1958). The American Arbitration Association indicated in 1954 that approximately 200 days passed between grievance and award; these were "averages, of course, with great variations on either side." *Id.* at 266. Statistics from Federal Mediation and Conciliation Service indicate that from 1971 through 1974 the average time from date of grievance filed to award was in excess of 250 days. 24th (1971), 25th (1972), 26th (1973) and 27th (1974) Annual Reports, Federal Mediation and Conciliation Service.

In the instant case, and within the world of arbitration, there was a "prompt" submission. The grievance herein was filed in October 1974 and a decision was due in August 1975 (30 days after briefs were submitted) —and this period of 10 months is well within reason for the processing of a grievance to conclusion. Especially is this so when it is recognized that this period also included time to settle the grievance short of an arbitration hearing.

Another substantial consideration is that the NLRB has applied unequal justice since the proof shows both Culpepper and the Board caused great delays in this case. Thus, the record reveals that the Board's decision to defer came down on December 1973 (more than a year after the ALJ's decision) but it was not until October 1974 that the grievance was submitted by Adams and Culpepper to arbitration. This last delay of 10 months was caused when Culpepper filed a motion lacking in merit which the Board did not decide for almost a year. Of equal significance is that the parties established time limitations in the grievance procedure but that there is no requirement that an arbitration be submitted within any specified period of time (A. 101-102). *Expressio unius est exclusio alterius.* But what the

Board has done when it declared the matter was not submitted promptly was to impose a quasi statute of limitations on the arbitration procedure and thus alter the agreement of the parties. The *Steelworkers Trilogy* made clear that an arbitrator must abide by the intent of the agreement and so must the Board.

The law favors a policy that decisions be decided on the merits, Wright & Miller, 9 *Federal Practice and Procedure*, § 2370 (pps. 216-217), and dismissal is ordinarily allowed only when the record, unlike the case at bar, clearly demonstrates delay or contumacious conduct. *Sheaffer* v. *Warehouse Employees Union, Local 730*, 408 F.2d 204 (C.A.D.C., 1969), *cert. denied*, 395 U.S. 934, 89 S. Ct. 1996 (1969). *U.S.* v. *Inter-American Shipping Corp.*, 455 F.2d 938, 940 (C.A. 5, 1972). Additionally, the Board's instructions were vague and general but then without notice it established a policy of laches. Certainly the Board could have fixed a period by when the arbitration process was to be completed or could have placed the Union on notice—Culpepper did make several motions requesting this relief—that it was contemplating the assertion of jurisdiction. The failure to give notice was clearly improper. Cf. *Mourning* v. *NLRB*, 505 F.2d 314 (C.A.D.C., 1974). Moreover, the Board's action was taken with no showing of prejudice and without knowing the speed (or lack thereof) with which previous arbitrations between the parties had been resolved. We think that the Board's conduct is so arbitrary and so unfair that this Court should exercise its power of supervision. Surely such behavior by the agency should not be countenanced.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

WILLIAM DEAN WAGNER
SPELMAN, EISENBERG, PAUL AND WAGNER
1925 North Lynn Street
Arlington, Virginia 22209
Counsel for Petitioner

ALAN D. EISENBERG
Of Counsel

April 4, 1977

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 75-1970

[Filed Dec. 23, 1976, United States Court of Appeals for the District of Columbia Circuit
George A. Fisher, Clerk]

COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

WILLIAM H. CULPEPPER

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before WRIGHT and ROBB, Circuit Judges, and GESELL,* District Judge.

ORDER

This cause came on to be heard on the record on review from the National Labor Relations Board and was

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1970).

argued by counsel. For the reasons set forth in the attached memorandum, it is

ORDERED by the court that the petition for review is hereby denied, and the cross-application for enforcement is hereby granted.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

The only question the union raises in this petition to review and set aside the NLRB's order of July 11, 1975 is whether the Board erred in reasserting jurisdiction because the union's alleged failure to proceed promptly to arbitration in accordance with the Board's initial decision and order. Finding no error in the Board's action, we deny the union's petition for review and grant the Board's cross-application for enforcement.

The Board's initial decision to defer the dispute to the parties' contractual grievance-arbitration machinery was taken pursuant to the policy announced in *Collyer Insulated Wire*, 192 NLRB 837 (1971). As in *Collyer*, however, the Board expressly retained jurisdiction of the proceeding

> for the limited purpose of entertaining appropriate and timely motions for further consideration upon a proper showing either (a) that the dispute has had [*sic* [1]], with reasonable promptness after the issuance of this Decision and Order, been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) that the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

207 NLRB 850, 851 (1973).

This court has repeatedly approved the Board's limited voluntary deferral policy as enunciated in *Collyer* and subsequent Board decisions. *Banyard* v. *NLRB*, 505 F.2d 342, 345-346 (D.C. Cir. 1974); *Local Union No. 2188* v. *NLRB*, 494 F.2d 1087, 1090-1091 (D.C. Cir.), *cert.*

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[1] It appears to have been implicitly conceded by all parties that the word "had" should be, and was intended by the Board to be, "not."

denied, 419 U.S. 835 (1974); *Associated Press* v. *NLRB*, 492 F.2d 662, 666 (D.C. Cir. 1974). *See also Nabisco* v. *NLRB*, 479 F.2d 770, 772-773 (2d Cir. 1973); 29 U.S.C. § 160(a) (1970). However, this court has also referred approvingly to a *Collyer*-based order by the Board which assured the parties, in language identical to that used by the Board in its initial decision here, that jurisdiction would be reasserted if the dispute was not resolved with reasonable promptness by arbitration or other peaceful means. *Associated Press* v. *NLRB*, *supra*, 492 F.2d at 668.

The record in this case provides ample justification for the Board's decision to reassert jurisdiction and exercise its statutory authority to adjudicate a controversy that has extended entirely too long. Despite the fact that it was the union which had originally urged deferral by the Board, the union had failed to agree to submit the dispute to arbitration a full three months after the Board's supplementary deferral order. Not until charging party Culpepper's first motion for Board consideration, in January 1975, did the union avow its intent to arbitrate. Twice thereafter it sought and received postponements of arbitration hearing dates it had previously agreed to—the second postponement coming a week before the scheduled revised hearing date and almost seven months after the Board's initial deferral order.

Admittedly, an arbitration hearing was held between the time of Culpepper's third motion for the Board to reconsider the case and the Board's final order. But, by the time this hearing was held, the Board could properly have found that the union had already failed to meet the "reasonable promptness" standard.

On the merits of this case, the record provides substantial evidence to support the Board's finding that the

union violated Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) (1970).

Accordingly, the petition for review is denied and the cross-application for review is denied and the cross-application for enforcement is granted.

APPENDIX B

[Dated July 28, 1975] MFJK
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 5-CB-1210

COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL-CIO (Byron S. Adams Printing, Inc.)

and

WILLIAM H. CULPEPPER, an Individual

ORDER DENYING MOTION FOR RECONSIDERATION AND STAY OF THE BOARD'S ORDER

On July 11, 1975, the National Labor Relations Board issued its Decision and Order in the above-captioned proceeding.[1] Thereafter, Columbia Typographical Union No. 101 (Respondent herein) filed a motion with the Board for reconsideration and stay of the Board's Order pending the Board's deliberations on the motion, the Charging Party filed an opposition to said motion, and Respondent filed a reply to the Charging Party's opposition.

The Board has duly considered the motion and request for stay, the opposition and the reply thereto, and hereby concludes that the motion is lacking in merit in that it raises no issues not previously considered by the Board.

Respondent has premised its motion on the ground that the Board issued its Decision and Order herein in the mistaken belief that "the dispute has yet to reach

[1] 219 NLRB No. 18.

the arbitral forum . . ." when, in fact, the dispute was placed in arbitration shortly before our Decision and Order issued. A fuller, and more precise, reading of our Decision and Order, however, is that "the dispute has yet to reach the arbitral forum because of Respondent's repeated cancellation of agreed to, and scheduled, times for arbitration. These numerous postponements are not commensurate which Respondent's obligation to arbitrate the dispute with reasonable promptness." [2]

Accordingly, it is hereby ordered that Respondent's motion for reconsideration and stay of the Board's Decision and Order be, and it hereby is, denied.

Dated, Washington, D.C., July 28, 1975.

BETTY SOUTHARD MURPHY, Chairman

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

RALPH E. KENNEDY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

[2] *Ibid.* Sl Cp., p. 2.

APPENDIX C

219 NLRB No. 18

MFJK
D—188
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 5-CB-1210

COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL-CIO (Byron S. Adams Printing, Inc.)

and

WILLIAM H. CULPEPPER, an Individual

SUPPLEMENTAL DECISION AND ORDER

On December 12, 1973, the National Labor Relations Board issued its Decision in the above-captioned proceeding [1] wherein it dismissed the complaint and deferred to the parties' contractual grievance-arbitration machinery in accordance with the principle of *Collyer* [2] and related cases, subject to reservation of appropriate jurisdiction. On January 11, 1974, the Charging Party moved the Board to vacate its Decision and Order and to render a decision on the merits favorable to it, contending, *inter alia*, that Respondent violated the substantive provisions of our Decision and Order because it failed to initiate the grievance-arbitration action required by that Decision and Order. By Order dated March 10, 1974,[3] the Board denied the aforesaid motion, finding that the re-

[1] 207 NLRB No. 125.

[2] *Collyer Insulated Wire, a Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

[3] 214 NLRB No. 13.

sponsibility for initiating grievance action rests on the aggrieved party; i.e., the Charging Party. Eight days later, the Charging Party and his employer, Byron S. Adams, Printing, Inc., filed grievances against Respondent covering the dispute which had been in controversy before the Board.

Two months later, on January 16, 1975, the Charging Party again moved the Board to consider the case on the merits and to adopt the Decision and Order of the Administrative Law Judge because Respondent "has consistently resisted efforts of the charging party to process the grievance—and has failed to agree to submit the matter to arbitration." By letter dated January 17, 1975, Respondent notified the Board that "it is agreeable to arbitrate the dispute." Despite this and other assurances from Respondent, however, the dispute has yet to reach the arbitral forum because of Respondent's repeated cancellations of agree-to, and scheduled, times for arbitration. These numerous postponements are not commensurate with Respondent's obligation to arbitrate the dispute with reasonable promptness. We find, therefore, that Respondent has not complied with either the meaning or the intent of the "reasonable promptness" provision of our Order. We further find, in agreement with the Charging Party's motion for further consideration, that the case should be decided on the merits. Accordingly, we hereby reinstate the complaint herein.

The Board has considered the record, the Administrative Law Judge's Decision, the exceptions and briefs, the Charging Party's motions for reconsideration and Respondent's replies thereto, and the various communications submitted to the Board by the parties, and has decided to affirm the rulings, findings,[4] and conclusions

[4] Members Fanning and Jenkins would not have deferred to arbitration but would have decided the case on the merits on the Board's initial consideration of the case, for the reasons set forth

of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO, Washington, D.C., its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Jul. 11, 1975.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

RALPH E. KENNEDY, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MURPHY, concurring:

Like all of my colleagues I would reach the merits at this time and join in finding the violations alleged.

Dated, Washington, D.C. Jul. 11, 1975

BETTY SOUTHARD MURPHY, Chairman

NATIONAL LABOR RELATIONS BOARD

in their dissenting opinions in *Collyer, supra,* and related cases, as well as for the reasons set forth by Member Jenkins in the decisions and orders previously issued in this proceeding.

APPENDIX D

MJK

Oct. 15, 1974
D—9163
Washington, D.C.

214 NLRB No. 13

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 5-CB-1210

COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL-CIO (Byron S. Adams Printing, Inc.)

and

WILLIAM H. CULPEPPER, an Individual

ORDER DENYING MOTION
FOR RECONSIDERATION

On December 12, 1973, the National Labor Relations Board issued its Decision in the above-captioned proceeding [1] wherein it dismissed the complaint and deferred to the parties' contractual grievance-arbitration machinery in accordance with the governing principles of *Collyer*,[2] *Houston Chronicle*,[3] and related cases, subject to reservation of appropriate jurisdiction. On January 11, 1974, the Charging Party filed a motion for reconsideration where it moved the Board to reconsider, *in*

[1] 207 NLRB No. 125 (1973).

[2] *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

[3] *Houston Mailers Union No. 36, a/w International Mailers Union (Houston Chronicle Publishing Company)*, 199 NLRB No. 69 (1972).

banc, the panel-issued Decision herein,[4] to vacate that Decision, and to render a decision on the merits favorable to its position because, *inter alia*, Respondent Union has not "chosen to invoke the grievance procedure or arbitration in defense of its challenged conduct . . . [either] prior to or since the Board order in this case. . . ." Thereafter, Respondent filed a response to the Charging Party's motion wherein it agreed to participate in the contractual grievance and arbitration procedure "when and if the Charging Party makes an appropriate demand for arbitration. . . ."

The substance of the Charging Party's argument is that the responsibility for initiating grievance or arbitration action rests upon Respondent, and that Respondent's failure to take such action has voided the substantive provisions of the decision rendered herein, thereby leaving the Charging Party without remedy absent Board resolution of the dispute. We find no merit in this argument.

It seems axiomatic that the party accused of causing a grievance is not going to file a grievance against itself, and that unless the aggrieved party initiates grievance action, there is no grievance susceptible of resolution and hence, no necessity for a remedy. The responsibility for initiating grievance action, therefore, if resolution thereof is desired, rests upon the aggrieved party, the Charging Party, and not upon Respondent, which has no grievance and which, moreover, has indicated a willingness to arbitrate the matter. In these circumstances,

[4] It is Board policy for the same panel which renders a decision in a case to pass upon any motion for reconsideration of a panel decision, and for the full Board to consider such a motion only if the panel refers it to the full Board. ***Enterprise Industrial Piping Company***, 118 NLRB 1 (1957). The panel has not referred such motion to the full Board. Accordingly, we deny the Charging Party's motion to have the full Board reconsider the panel-issued Decision herein.

it is difficult to perceive how Respondent's failure to initiate grievance action is in derogation of our decision.

A remedy, moreover, is available to the Charging Party other than by Board resolution of the dispute. The Charging Party simply needs to initiate action pursuant to the contractual grievance and arbitration procedure.[5] By electing not to do so, it not only has deprived itself of an available remedial process, but it also is attempting to do by indirection that which it could not do directly; namely, have the Board initially determine the dispute. Accordingly, we shall deny the Charging Party's motion for reconsideration.

It is hereby ordered that the Charging Party's motion for reconsideration be, and it hereby is, denied. However, we shall retain jurisdiction for the limited purpose of entertaining appropriate and timely motions for further consideration upon a proper showing either (a) that the dispute has not been resolved with reasonable promptness after the issuance of this Order denying the Charging Party's motion for reconsideration by amicable settlement in the grievance procedure or has not been submitted promptly to arbitration, or (b) that the grievance

[5] Our dissenting colleague asserts that the Charging Party here cannot invoke arbitration. We think it unrealistic to believe that a foreman, whose conduct on behalf of the management of the Company has given rise to the allegedly improper union action complained of here, is not in a position effectively to initiate grievance and arbitration action on behalf of the Company. In any event, since the gravamen of Sec. 8(b)(1)(B) is the restraint or coercion of the *employer*, and since the employer clearly has a right to seek arbitration but has not, we fail to see what statutory purpose would be served by our insisting upon litigating this matter at this time.

or arbitration procedures have not been fair or regular or have reached a result which is repugnant to the Act.

Dated, Washington, D.C. Oct. 10, 1974.

EDWARD B. MILLER, Chairman

RALPH E. KENNEDY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER JENKINS, dissenting:

After the Board had previously deferred this case to arbitration under *Collyer* and *Houston Chronicle*, and over my dissent, a month then elapsed with neither the Union nor the Employer seeking arbitration. Culpepper, the foreman and Charging Party who asserts he was wrongfully discharged in violation of Section 8(b)(1)(B), now renews his request that the Board decide his case on the merits. He asserts, correctly I think, that he cannot invoke arbitration. The parties to the arbitration contract have chosen not to do so, whether for (in the Union's case) satisfaction with the present situation or (in the Employer's case) through distrust of the process, for fear of the results (whether favorable or unfavorable), or for some other reason.

Whatever the reason, *Collyer* has prevented the Board from deciding, and has left undecided, what on its face would seem to be a violation of Section 8(b)(1)(B). I continue to regard this as an ill-advised policy and a nonfeasance of our duties as the Agency charged with administering and enforcing this statute.

Dated, Washington, D.C. Oct. 10, 1974.

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX E

207 NLRB No. 125

MJK
D—7845
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 5-CB-1210

COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL-CIO (Byron S. Adams Printing, Inc.)

and

WILLIAM H. CULPEPPER, an Individual

DECISION AND ORDER

On November 21, 1972, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed a brief in support of the Administrative Law Judge's Decision, Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief combined with a motion to strike Respondent's exceptions, Respondent filed an opposition brief thereto together with a motion for leave to include an addendum to its exceptions, Respondent also filed a motion for leave to file a supplemented statement, and the Charging Party filed an opposition brief thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and motions [1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent and Byron S. Adams Printing, Inc., herein called Adams, are parties to a collective-bargaining agreement which provides, in pertinent part, that the chapel chairman is Respondent's representative of the employees, that the composing room foreman is management's representative, and that the foreman shall be a member of Respondent in good standing and shall not be subject to fine, discipline, or expulsion by Respondent "for any act in the performance of his duties as foreman, where such action is authorized by this Agreement." The agreement also contains a grievance procedure which culminates in binding arbitration covering "controversies or disagreements . . . limited exclusively and specifically to differences in the interpretation and enforcement of the terms of this Agreement, including the question of whether the dispute issued is covered by the terms of this Agreement. . . ."

The controversy here in issue arose because Chapel Chairman Manbeck allegedly interfered with the production of the composing room employees while carrying out his union duties as steward. That controversy was heightened when Composing Room Foreman Culpepper ordered Manbeck out of the composing room for overstaying a company-imposed time limitation during which he was permitted to carry on his union function, and be-

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[1] Inasmuch as Respondent's exceptions are sufficiently clear and adequately set forth its position, we hereby deny its motion for leave to include an addendum to its exceptions. We also deny Respondent's motion for leave to file a supplemented statement because the matters raised therein have no substantive bearing on the issues involved herein.

came severe when the two men exchanged remarks which led Culpepper to dare Manbeck to remain, and Manbeck's acceptance of the challenge. Manbeck was then treated as a trespasser and was arrested when he subsequently refused to leave at the request of the police.

Later that month, when Manbeck was working in the composing room as a substitute, Culpepper invited him into a proofreading room in which Culpepper had installed a recorder which taped their ensuing conversation pertaining to various grievances and shop problems. Manbeck was unaware of the taping until the conclusion of their discussion, at which time he accused Culpepper of violating both his constitutional and union rights.

Respondent thereupon instituted internal union charges against Culpepper which ultimately resulted in Culpepper's expulsion from the Union, a $5,000 fine for causing Manbeck's arrest for "trespassing" in the composing room, and a $1,000 fine for utilizing the tape recorder without Manbeck's knowledge or consent.

Culpepper's expulsion caused Manbeck to instruct the composing room employees not to take orders from Culpepper because he no longer was a union member, as required by the collective-bargaining agreement. Culpepper's attempt to do so resulted in a 1-day strike during which time the Company's attempt to subcontract its work was nullified by Manbeck's threat to picket the subcontractor. In any event, the strike terminated under a still-operative arrangement whereby Culpepper articulates work orders to a company-designated acting foreman who is a union member in good standing and who, in turn, passes on the orders to the employees. At least one of the two employees designated as acting foreman since the conclusion of the strike has spent approximately 50 percent of his time in that capacity, for which he has received no additional pay.

Following the close of the hearing, the Board issued its *Houston Chronicle*[2] decision which further articulated its *Collyer* rule.[3] Respondent thereupon moved the Administrative Law Judge to dismiss the complaint and allow the parties to resolve the dispute pursuant to their contractual grievance-arbitration machinery, citing *Houston Chronicle* and *Collyer* as authority. The Administrative Law Judge denied Respondent's motion on the ground that *Houston Chronicle* is distinguishable from this proceeding, and found that Respondent violated Section 8(b)(1)(B) of the Act by fining and expelling Culpepper, by striking Adams, and by threatening to picket the company to which Adams attempted to subcontract. *Inter alia*, he also ordered Respondent to reimburse Adams "for one half the amount [the two acting foremen] have been paid. . . ."

We disagree with the Administrative Law Judge's conclusion that this proceeding is distinguishable from *Houston Chronicle* and, consequently, with his denial of Respondent's motion to defer to the grievance-arbitration procedure. There is no element of the controversy which is not cognizable of resolution through that procedure, including the strike and its aftermath, for those activities are interwoven in the basic dispute. This dispute encompasses matters, rights, and obligations set forth with some particularity in the parties' collective-bargaining agreement, and is cognizable in a forum which the parties have contractually committed themselves to utilize in the first instance. Accordingly, for the reasons set forth in the *Washington Post* case,[4] we shall dismiss

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[2] *Houston Mailers Union No. 36 a/w International Mailers Union (Houston Chronicle Publishing Company)*, 199 NLRB No. 69.

[3] *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837.

[4] *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO (The Washington Post Company)*, 207 NLRB No. 123.

the complaint herein and defer to the contractual grievance-arbitration machinery in accordance with the governing principles of *Collyer*, *Houston Chronicle*, and related cases, subject to reservation of appropriate jurisdiction.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed; provided, however, that jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining appropriate and timely motions for further consideration upon a proper showing either (a) that the dispute has had, with reasonable promptness after the issuance of this Decision and Order, been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) that the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

Dated, Washington, D.C. Dec. 12, 1973.

EDWARD B. MILLER, Chairman

RALPH E. KENNEDY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER JENKINS, dissenting:

This is the third in a series of cases[5] in which this same Respondent impermissibly sought to interfere with or control the supervisory functions of one of its members through the imposition of internal union disciplinary measures for reasons which have no bearing on the parties' collective-bargaining agreement and which are beyond the scope of, and not resoluble through, the contractual grievance procedure; i.e., by fining and expelling Culpepper because he took unlawful steps within his supervisory capacity to terminate the steward's unwarranted interference with production.

It is also one of a long series of cases in which my colleagues, through application of the *Collyer* rule, have denied the employer's statutory rights and remedies under Section 8(b)(1)(B) of the Act by requiring the parties to consider and determine, through the contractual forum, public rights which exist solely by virtue of the Act and independently of any contractual obligations.

Accordingly, for the reasons set forth in the dissent in the *Washington Post* case, 207 NLRB No. 123, and in *Collyer*, *Houston Chronicle*, and related cases, I would decide this case on the merits.

Dec. 12, 1973.

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

[5] *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO (The Washington Post Company)*, 207 NLRB No. 123; *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO [The Washington Post Company] (Washington Publisher's Association)*, 207 NLRB No. 124.

APPENDIX F

JD-770-72
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 5-CB-1210

COLUMBIA TYPOGRAPHICAL UNION NO. 101, INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA, AFL-CIO (BYRON S. ADAMS PRINTING, INC.)

and

WILLIAM H. CULPEPPER, An Individual

Hubert E. Lott, Esq., for the General Counsel.

Seymour J. Spelman, Esq., of *Spelman and Wagner*, of Arlington, Va. for the Respondent.

Lawrence T. Zimmerman, Esq., of *Johns & Zimmerman*, of Washington, D.C. for the Charging Party.

DECISION

THOMAS A. RICCI, A.L.J.: A hearing in the above-entitled proceeding was held on September 11, 12 and 13, 1972, at Washington, D.C., on complaint of the General Counsel against Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO, herein called the Respondent or the Union. The charge was filed on January 19, 1972, and amended on March 1, 1972, by William Culpepper, and the complaint issued on March 21, 1972. The issue of the case is whether the Respondent restrained and coerced Byron S. Adams Printing Inc., of Washington, D.C., in volation

of Section 8(b)(1)(B) of the Act. Briefs were filed by all parties.

Upon the entire record and from my observation of the witnesses I make the following:

Findings of Fact

I. Business of the Employer

Byron S. Adams Printing, Inc, is a wholly owned subsidiary of Publishers Company, Inc., a District of Columbia Corporation engaged in the business of commerical printing. During the 12 months preceding issuance of the complaint, a representative period, Adams purchased and received materials and supplies in its District of Columbia place of business valued in excess of $50,000, and performed services for and shipped printed materials to persons and corporations valued in excess of $50,000. I find that Adams is an employer within the meaning of the Act and is engaged in commerce within the meaning of Section 2 of the statute.

II. The Labor Organization Involved

I find that Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

On February 22, 1972, the Respondent Union called a strike by all the employees in the composing room of Adams Printing Company to force it to remove William Culpepper, the general foreman, from his position as management representative, and to replace him with another union member. It's reason for doing this was because Culpepper had placed a limitation upon the length

of time the Union's steward could discuss union matters with the employees inside the composing room, while they were at work, and while they were being paid to work. I find that by imposing a fine upon Culpepper, himself a union member, by expelling him from union membership, and by so striking the Company, the Respondent coerced the employer in the selection of its representative in violation of Section 8(b)(1)(B) of the Act, as alleged in the complaint.

The pertinent facts are plain and not really disputed. For some years the Union has been the bargaining agent, under successive written contracts, for the 15 or 20 employees in the composing room. Its steward, here called chapel chairman, at the time of the event was Jesse Manbeck. He was discharged in an economic reduction in force on December 17, 1971.[1] He continued thereafter with great frequency to come to the plant, stayed both before and during the work shift, and talked to the employees while they were at work. Again and again Culpepper, the general foreman, told him to leave, but Manbeck refused; Hurbert Jacobs, the manger of the entire company, told him the same thing, but was similarly rebuffed. Finally, by letter dated January 7, 1972, the Company limited the steward's time in the shop to 15 minutes before each of the two shifts then in operation, plus 20 minutes after the start of each shift, with another 30 minutes during the lunch of each shift. The latter read as follows:

[1] Among the distracting colorations placed into the record by the Respondent was the question whether the steward retained employee status after December 17. The question is irrelevant to the issues raised by the complaint; it would therefore be pointless to discuss here the evidence indicating that he worked occasionally, as a substitute proofreader, beginning at the earliest during March of 1972. In insisting upon a reasonable limit to the steward's time for carrying on union activities in the shop during working hours the employer never predicated its position upon any assertion that Manbeck was not an employee.

> As Vice President and Chapel Chairman you are entitled to enter out plant, but your presence here for an unreasonable period of time is an unwarranted interference with production. We feel it would be reasonable for you to be here 15 minutes before the start of the work shift and to remain a reasonable time past the start of the shift. We believe 20 minutes would be a reasonable time.
>
> You are not to interfere with the work flow or production in any way, if there are any complaints or grievances, these should not be discussed on company time.

The next day Manbeck answered the Company in writing, saying he would refuse to abide by the direction. Among other grounds he based his refusal on the assertion that the collective-bargaining agreement in effect contained no "restrictive language" in this respect, that he would "be the judge of my own duties as a union official," and that he would be governed by "union laws" in the matter and not by "unilateral edict of management officials."

On January 11 Manbeck was back in the composing room, talking to the employees, and stayed beyond the now alloted 20 minutes after the shift had started working. Culpepper told him to leave and he refused. The Company called the police, the police asked him to leave, he refused again, and he was arrested.[2]

[2] The general foreman and the steward disagreed at the hearing as to the words they exchanged that morning. Culpepper said he simply ordered the man to leave; Manbeck testified he was on his way out and the foreman dared him to remain. Here again a question totally irrelevant to the case was raised, for it is clear on Manbeck's own story that by the time the police arrived he had deliberately sat down again and in fact refused their request to depart. He conceded his indifference to the foreman by testifying he then told him; "I'm not working for you today. I'll come back when I please and take care of union business." As he would

The next thing that happened is that Manbeck, and the president of Local 101—Raymond Hall, filed internal union charges against the foreman. The charge was processed in regular fashion, Culpepper was found guilty, and the membership voted, on February 20, to fine him $5,000 and to expell him from the Union. As stated in the Union's report to its members, Culpepper was fined and expelled "for causing the arrest of the chapel chairman for alleged 'trespassing.'" The Company and Culpepper were advised and on the next workday, February 22, Manbeck came to the plant to give effect to the expulsion. He gathered all the employees of the composing room and instructed them to refuse to accept any work orders from Culpepper because he was no longer a union member. The foreman then ordered the men to work, they refused and he discharged every one of them then and there. At the hearing Manbeck testified he told Culpepper that day, in the presence of all the employees; ". . . if you will leave the room we will go to work. If you don't, then we are not going to work." With this statement by the steward, the Respondent's contention, that the work stoppage resulted from the Company's discharge of the men, merits no comment. It was a strike to force the employer to replace Culpepper with a union member more amenable to the Union's view of how the Company should conduct its labor relations.

Later in the day the employer contracted out the work in progress, apparently to other shops run by other companies owned by the same parent organization, Publisher's Company, Inc. The Union's officers then advised the parent Company that the subcontracting would not be permitted, that it would picket the other plants if

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have it by that time it had become a test of wills between him and the foreman. I credit Culpepper's version, but all that matters is that the 20 minutes after starting time had elapsed and Manbeck did refuse to leave. Indeed it was with reluctance that the police had to handcuff him, for he is 76 years old and a gentleman.

necessary,[3] and the strike was settled that night. The basis of settlement was that the Company capitulated completely to the Union's demands. The men returned the next morning; in Culpepper's place the Company designated one of the lower foremen, Lawrenson, as acting foreman. The arrangement was that Culpepper would articulate work orders to Lawrenson, who then, because he was a member of the Union in good standing, passed on the orders to the men. With this work was resumed, and it has continued in this fashion to this day. Some time in April Lawrenson returned to another job and another union member—Charles Shaugruie—took his place as acting general foreman and has since been passing Culpepper's orders on to the men. Culpepper never paid the union fine and was never reinstated into the union.

Analysis

The law is clear. Section 8(b) (1) (B) of the Act reads as follows: "It shall be an unfair labor practice for a labor organization or its agent—to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Culpepper is concededly a supervisor; it is no less clear that he speaks for management in the "adjustment of grievances." Apart from other evidence that

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[3] The Respondent's threat to picket other companies, albeit seemingly primary employers, appears in the testimony of two witnesses. Robert Orth, president of Type, Incorporated, a subsidiary of Publisher's Company, said Manbeck called to tell him "that Type, Incorporated, and Merkle Press would be involved in a picket line operation . . . ." According to Manbeck he told Orth ". . . we are doing Merkle work down here, and we are having trouble. It may eventuate in having pickets around this place." I find, as alleged in the complaint, that by threatening to picket the premises of Type, Incorporated, and of Merkle Press, in furtherance of its object of forcing the removal of Culpepper from the employ of the Adams Printing Co., the Respondent violated Section 8(b) (1) (B) of the Act.

he represents, and has represented the Company in specific disputes with union agents, the very act by him which the Union found anathema and for which it punished him went to the heart of labor relations. Manbeck said all he did in the shop was check to see if the employees had things to complain about, whether they were being paid properly, whether work assignments conformed with the contract provisions, etc. This was purely a concern with the grievance procedure. Further, no question here of direct as distinguished from indirect coercion of the employer. See, *San Francisco-Oakland Mailers' Union*, 172 NLRB No. 252. There can be no more direct force exerted by a union upon an employer than pure strike action to win a demand—legal or illegal.

A number of arguments are advanced in defense and all ultimately rest upon the fact that the collective-bargaining agreement between the Union and this company requires union membership by the general foreman; the Respondent calls this one phrase "the heart of the whole case." None of the contentions suffices to defeat the complaint. There is no legal precedent for the proposition that a contract clause requiring union membership by supervisors as a condition of employment is *not* in itself an unfair labor practices. *Electrical Workers (IBEW)* v. *N.L.R.B.*, September 22, 1972, D.C. C. A. fn. 69, 81 LRRM 2257. And in *Toledo Blade Co.*, 175 NLRB 1072, involving another local of the parent organization of the Respondent Union here, the Board adopted the following language of the Trial Examiner: ". . . such discipline by a union, though the employer may have consented to the compulsory union membership of the supervisor under a union security clause, is an unwarranted 'interference with the employer's control over its own representatives,' and deprives the employer of the undivided loyalty of the supervisor to which it is entitled." Accord: *IBEW* v. *N.L.R.B.*, *supra*, 81 LRRM at page 2263.

The Union reads its contract as limiting the Company so that any and every member of management may engage in only those managerial acts specified in *haec verba* in the agreement. An extension of this argument is that because the contract does not specify how much time the steward or the employees may devote, during working hours, to discussion of union affairs, they all may do so without limit. From this it follows, according to the Respondent, that it may force the removal of any foreman doing anything not conceded to him by the Union, or from imposing any limitation upon union activities during working hours, and never mind Section 8(b)(1)(B) of the statute. Thus, according to Vitto, a witness for the Respondent, when asked by Culpepper to leave the composing room, Manbeck answered "I'll leave when I get through . . . he would leave when he got through with his Union business." Earisman, also called by the Respondent, testified Manbeck told Culpepper on the composing room floor he [Culpepper] is not supposed to be out on the floor formanizing [sic]."

There is nothing in the contract that limits the right of the employer to run its business, to expect people to work during the time for which they are being paid, or to take any action in the interest of the Company. Indeed this is the very area, external to union affairs, of which the relevant cases speak. "The supervisor—employer relationship is impermissably affected in an adverse manner, through the union's subversion of the undivided loyalty owed by the supervisor to his employer when he is properly acting to further the interests of his employer." *Electrical Workers (IBEW)* v. *N.L.R.B.*, *supra*. This statutory protection from union coercion afforded the employer by the statute cannot be denied by any innuendo or strained reading of its collective-bargaining agreement. For the argument that the Adam Company waived its legal rights under Section 8(b)(1)

(B) the Respondent relies entirely upon a contract clause which reads the foreman "shall not be subject to fine, discipline, or expulsion by the Union for any act in the performance of his duties as foreman, when such act is authorized by this Agreement." This is hardly that "clear and unmistakable language" requisite under the law for depriving unions of their statutory prerogatives. *Timken Roller Bearing Company*, 138 NLRB 15. The employer's rights merit no less protection. To the contrary, what is written into the contract, albeit not in so many words, is that the employees will work for their pay, and that the employer may see to it at any time that they do so. Such reading of the contract is dictated of necessity from the fact it provides the employees will be paid so much or so much. *Republic Aviation* v. *N.L.R.B.*, 324 U.S. 793, fn. 10. In Timken Roller Bearing the Board considered statutory rights enjoyed by unions, and said that every such right "exists by virtue of the statute apart from any contract concession by the employer." No less do the rights of employers under this statute have validity apart from union concessions. But even assuming there was any disagreement between Manbeck and Culpepper over the import of the existing contract, the Company was still entitled to the supervisor's "undivided loyalty." *Meatcutter's Union Local 81* v. *N.L.R.B.*, 485 F. 2d 794.

Both parties to the underlying dispute—the Union and the Company—offered evidence to prove an ancient personal animosity between the steward and the general foreman. It is all beside the point; neither is obligated to like the other, so long as each keeps his activities within the ambit alloted him by the scheme of the statute. Compare: *Signal Manufacturing Co.*, 150 NLRB 1162, enfd. 351 F. 2d 471 (C.A. 1), cert. den. 382 U.S. 985.

A final argument is that because this company, and others in the immediate geographical area, permitted the

Respondent's agents to engage in union activities during working hours with the employees without limitation, the Respondent has forever surrendered the right to impose any limitation upon the conduct. The short answer to this is that no party—union or employer—surrenders any statutory right "simply because it was unsuccessful in obtaining a provision in the contract requiring" the other party to abide by rules of law.

One day, while Manbeck was in the plant as usual, the foreman invited him to his office to discuss a number of issues in dispute between them. The two sat and conferred for about 30 minutes. Culpepper's recollection was that they talked about the justification or absence of justification for the December layoff, the proper method for the steward to obtain payroll information for union purposes, the kind of work orders the employees were required to accept from the foreman, etc. ". . . I told him that as far as I was concerned, he could make a grievance on any issue he would like to. I would like the disruption of the composing room to stop, and we would argue the grievance down at the Printing Industry of Washington." Manbeck testified Culpepper wanted to talk to him "about union matters, as a chairman, not as an individual employee . . . ." He added they discussed "the layoff, which I considered illegal, and how we could settle this thing? . . . it was a conference of the Union representative and the foreman." At the end of the meeting Manbeck first became aware that there was a recording machine on the desk and that it had been functioning during the conference. He accused Culpepper of infringing upon his Constitutional rights. Some words were exchanged, and the upshot of this incident was that when charges were filed against Culpepper later, after Manbeck had been arrested, an added charge was based on this hidden use of the recording device. The Union

trial committee found Culpepper guilty as charged and he was fined an additional $1,000 for the offense.

I find that by imposing this additional fine on the general foreman as punishment for the manner in which he chose to carry on his negotiations with the union representative the Respondent committed a further unfair labor practice in violation of Section 8(b)(1)(B) of the Act. The conference with which the Union found fault was strictly part of the collective-bargaining procedure, a discussion of the merits of grievance matters. The general foreman chose to do it his way, to look after the interests of management by recording the steward's words with precision and with the steward off guard. He did not thereby inhibit Manbeck; he did nothing to interfere with the union representative's freedom in his functioning as the spokesman of the majority agent. It would not be conducive to the entire process of collective bargaining if one party could dictate the exact manner in which the other must conduct itself in negotiations, or in grievance handling. Free collective bargaining means that neither party coerces the other. The apparent difficulty here arises from the same anomoly that underlay the basic disagreement between these two men and which lead to Culpepper's expulsion and the strike. The foreman wears two hats; under the scheme of the statute, and particularly Section 8(b)(1)(B), the management figure—like his counterpart, the union man—must be free to act independently of any improper force exerted by the other.[4]

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[4] On November 9, 1972, the Respondent filed a motion to dismiss the complaint, citing *Houston Mailers Union No. 86* as authority. The motion is denied as in my opinion the cited case is distinguishable. In any event in a field of developing law it is best for the Board to ennunciate principles in the first instance.

The Remedy

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(B) of the Act, it will be recommended that it cease and desist therefrom, and from like or related conduct, and that it take certain affirmative action which I find necessary to effectuate the policies of the Act. The Respondent must rescind its action fining William Culpepper and expunge all records of those fines from its files, as well as any record of the expulsion of Culpepper from union membership. Part of the Union's unlawful coercion upon the Company was to compell it to hire two union members through whom the general foreman must convey his work orders or directions to the rank-and-file employees. The evidence shows that throughout the time these two men, first Lawrenson and then Shaugruie, functioned in this manner, one half of their time was devoted to regular production work and one half merely to passing the general foreman's orders on to the employees. That situation is still prevailing. The Respondent must be ordered to reimburse the Company therefore for one half the amount these two men have been paid since the time of the strike in February of 1972, and until such time as the use of these men or anyone like them is no longer compelled upon the Company.

Conclusions of Law

By fining William Culpepper $1000 for the use of a tape recording machine in a grievance meeting and $5000 for imposing a time limitation upon the Union steward's privilege to conduct union activities during working hours in the shop, by expelling William Culpepper from the Union, by striking the Adams Printing Company to force the removal of its general foreman, and by threatening to picket the premises of Type Incorporated, and Merkle Press, in furtherance of this unlawful pressure

upon the Adams Company, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I issue the following recommended:[5]

ORDER

Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO, the Respondent herein, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Fining, expelling, or otherwise disciplining supervisors of Byron S. Adams Printing, Inc., for the purpose of restraining and coercing that Company in the selection of representatives for the purpose of collective bargaining or adjustment of grievances.

(b) Engaging in a strike against that Company or threatening to picket related companies for the same purpose.

(c) In any like or related manner restraining or coercing Byron S. Adams Printing, Inc., in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

[5] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Rescind and expunge from its files all records of the fines levied against William Culpepper and advise him in writing that the said fines have been rescinded and that the records of such fine have been expunged.

(b) Reimburse Byron S. Adams Printing, Inc., in the manner set forth under the Section entitled Remedy above, for monies paid to members of the Respondent Union for functioning as substitute general foremen forced upon the company by the Respondent.

(c) Post at its office and meeting hall and at any bulletin boards maintained by it at the Byron S. Adams Printing, Inc., Company Plant, copies of the notice attached, marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director signed copies of said notice for posting by Byron S. Adams Printing, Inc., if willing, in places where notices to its composing room employees are customarily posted.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order,

[6] In the event that the Board's Order is enforced by a Judgement of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ Thomas A. Ricci
THOMAS A. RICCI
Administrative Law Judge

APPENDIX

FORM NLRB—4726
(4-71) JD-770-72

[SEAL] NOTICE TO MEMBERS [SEAL]

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT fine, expell or otherwise discipline William Culpepper or any other supervisor of BYRON S. ADAMS PRINTING, INC., who is a member of this labor organization, for mechanically recording a grievance procedure conversation with representatives of our Union or for imposing a time limitation upon any of our representatives for purposes of carrying on union business in that Company's composing room during working hours.

WE WILL NOT ENGAGE in a strike gainst the BYRON S. ADAMS PRINTING, INC. or threaten to picket the premises of TYPE, INCORPORATED, or MERKLE PRESS, for purposes of forcing the ADAMS COMPANY to remove its general foreman.

WE WILL rescind and expunge from our files all records of the fines levied against William Culpepper and of his expulsion from our organization.

WE WILL reimburse the BYRON S. ADAMS PRINTING, INC., for monies paid to any of our members for functioning as substitute general foremen in the Company's composing room.

BYRON S. ADAMS PRINTING, INC.

(Employer)

Dated _____ BY _____
(Representative) (Title

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building Room 1019 Charles Center, Baltimore, Maryland 21201 (Tel. No. 301-962-2822).